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Department of Transportation

400 7<sup>th</sup> St., SW, Room PL401

Washington DC 20590

Comments on 49 CFR Part 40 - Procedures for Transportation Workplace Drug and Alcohol Testing Programs; Proposed Rules

**Directly Observed and Monitored Collections (40.67, 40.69)**

**Q.** Should we require an immediate recollection under direct observation if an employee's specimen is dilute?

**A.** No. There are some valid reasons why an employee's specimen may be dilute. Also, requiring this would cause administrative problems. Many collection sites operate with only a few staff members. These small sites are often not able to provide this service. Arranging direct observation with a collector of same gender is **difficult**, and sometimes it is just not possible to do so in a timely manner. Additionally, employers still have the option to send an employee for an observed collection the next time the employee is selected for testing if the employee's previous collection was dilute.

I'm glad to see the distinction between an observed and a monitored. Collection sites as well as employers seem confused on this matter.

**MRO Training and Responsibilities**

Requiring **MROs** take a training course every two years or certify that they have reviewed and understand Part 40 is necessary to maintain the integrity of the program and would act as a quality control in regard to their services.

**MRO Verification Process**

**Q.** Should an exception **be** made in regard to the employee providing a legitimate medical explanation for **PCP** use.

**A.** Yes. Since there is no legitimate medical application for **PCP**, asking an employee for additional information seems to be a moot point as well as a waste of time.

**Q.** If an individual has a permanent or long-term disability, should the individual undergo a medical examination to determine if he/she is free of signs/symptoms of drug abuse in lieu of a random test in the usual way?

A. No, as these employees are exempt from the **pre-employment** test, they should be exempt from other types as well. If implemented, this additional process would raise too many administrative issues. First, would the employee be able to use his/her personal physician? Second, would there be a deadline as to when the exam would need to take place? It might take a few to several weeks before the employee could get an appointment. Third, since this process would take the place of a random or other required test, the employer would have to pay for it. Without a doubt this would be substantially more expensive than a random drug test. It seems like a lot of extra work for an extremely small segment of the testing population. Lastly, how would a physician be able to determine **if an** employee was definitely using drugs (and specifically what drugs), and would this physician's opinion hold up in court? Most general physicians have a very limited knowledge of drug abuse/addiction.

### **Adulterated, Substituted, and Dilute Tests**

Q. Should split specimen testing procedures apply to adulterated or substituted specimens?

A. No. Split specimen testing is not constitutionally mandated for any type of positive drug test. Since splits performed on an adulterated/substituted specimen cannot verify a positive test for any specific drug, this is pointless. Not giving the employee the ability in this case to have a split sample performed also sends a message that tampering/substituting is serious offense. Denying employees the opportunity of getting their split sample tested, sends a message that this is even a more serious offense than having a positive drug test. Additionally, if split testing were allowed, the employee would be given yet another opportunity to beat the system due to collection site errors or the breakdown of **adulterants** over time.

### **Employer Actions**

Q. Should the employer take employees temporarily out of service based on a **MRO** report that the employee has a confirmed positive test, pending completion of the verification process?

A. No. As long as there is a chance the test results may be downgraded as a result of the **MRO** process, this is not a good idea. If implemented this could result in stigmatization of employees as drug users when such may not be the case. It would also be an administrative nightmare trying to figure out salary and payroll issues.

### **Substance Abuse Professionals**

**NPRM** would add training requirements for SAPs.

Comment: This is desperately needed! I personally deal with a network of approximately **25 SAP's**. The only knowledge these **SAPs** have of federally testing regulations has come to them via the of Substance Abuse professional Procedures Guidelines for Transportation Workplace Drug and Alcohol Testing Programs (**6/95**) which I have mailed to them. Most were not even

aware they existed. Since federal testing affects such a large population, I would like to see some kind of partnering between state or national licensing agencies and **SAPs** in regard to education on the federal **regs**. For instance, making knowledge of the federal **regs** a part of the SAP certification process.

**Q.** Should **SAPs** be able to obtain drug test quantity levels from laboratories such as **MROs** can?

**A.** Absolutely. Especially when dealing with employees who use marijuana, it is extremely important to be able to have a baseline to determine if the **THC** is actually leaving the employee's body or if that employee continues to use while receiving treatment.

**Q.** Is the minimum requirement of six follow up tests over the period of one year sufficient?

**A.** Yes, current regulations allow **SAPs** the option of increasing that number of tests at any given time over a five year period following the employee's return to duty. Additionally, employers also have the option of sending these employees for non-Federal follow up drug tests. (This works very well.) So at any given time an employee may be in a random pool as well as receiving follow up tests as recommended by the SAP and non-Federal follow up drug tests as authorized by the employer.

**NPRM** proposes prohibiting individuals who test positive/refuse testing on **pre-employment** tests from performance of any and all DOT safety-sensitive duties until and unless the person completes the SAP evaluation, referral and treatment process.

Comment: In theory this is a good idea. In practice, how would it work? As the individual who tests positive or refuses to test would not be hired, how and where would other potential employers get knowledge of this confidential information?

### **Comments on SAP Process**

The one area of the **regs** that concerns me the most is the SAP process. Most importantly, I would like to see the SAP role more evenly shared with the treatment SAP. Both play an integral part in **the** employee's recovery. As such, both should have a voice in deciding when an employee may return to duty. This cannot be determined through a face to face meeting with the evaluating SAP.

Although the evaluating SAP makes treatment recommendations, the treatment SAP and the insurance company in the end decide what the treatment will be. For example, the SAP may recommend a specific treatment program (**16 week ed** program) while the employee's insurance may only cover 12 weeks, or the treatment provider may only offer an 12 week program. Additionally, **after** an employee is in treatment for a while, the employee's treatment plan may change. The treatment SAP may actually uncover new information (which the evaluating SAP did

not have) and increase the employee's treatment. I have had this happen on several occasions. That being the case, how can the evaluating SAP determine if the treatment program is being followed and if the employee is in compliance? Surely this can only be verified by the treatment SAP who sees and evaluates the employee regularly rather than by the evaluating SAP who at best has seen the employee for only a few hours. For that reason, I would like to see the regulations state that the employee may return to duty when the evaluating SAP and the treatment SAP determine the employee is in compliance with the treatment program. This ensures both are actually communicating and serves both the employee's and the employer's best interest. I can see no purpose or benefit in sending the employee back to the evaluating SAP before allowing the employee to return to duty. This is an additional and unnecessary step in the process which should be eliminated.

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